Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

Donald J. Farr; Gregory H. Ishmiel; Rod W. Tracy; Willis L. Radar; Joseph T. Dean; Robert Heuser; and Jeanette P. Neufeld,

Petitioners,

v.

US West, Inc.; the US West Management Pension Plan; and US West Communications,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Leslie L. Wellman
Attorney of Record
for Petitioners

10340 N.E. Weidler St.
Portland, Oregon 97220
(503) 255-4047)

44/99

QUESTIONS PRESENTED

The Employee Retirement Security Act of 1974 (ERISA) provides that a civil action may be brought to obtain "appropriate equitable relief" to redress violations of ERISA. 29 U.S.C. §1132(a)(3).

If an Employer/Fiduciary has been found to have breached its fiduciary duties under ERISA by inducing plan participants to elect early retirement through misrepresentations:

1. May the court award back pay and/or front pay as forms of restitutionary "appropriate equitable relief" under 29 U.S.C. Section 1132(a)(3)?

2. May the Court order restorative relief such as reformation of the ERISA Plan to redress breaches of fiduciary duty as a form of "appropriate equitable relief" under ERISA?

3. Is status as a fiduciary (as opposed to a non-fiduciary) an appropriate circumstance to consider in determining the types of "appropriate equitable relief" which are available to redress violations of ERISA?

4. Are state law claims involving misrepresentations in an employer's offer of early retirement to employees, preempted by ERISA (29 USC Section 1144(a)) where the misrepresentations about possible income tax consequences of pension distributions are made in the employers capacity as settlor of the plan?

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PETITION FOR WRIT OF CERTIORARI

Petitioners hereby respectfully request a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

I OPINIONS BELOW

On June 15, 1998, the Ninth Circuit Court of Appeals entered its decision in Farr v. US West, Inc. 151 F.3d. 908 (9th Cir. 1998)(App."A", pp. 1-18) with Concurring Opinions at App."A", pp. 14-16). On November 18, 1998, the Ninth Circuit granted a Rehearing on the matter and presented three specific questions for additional briefing (App."D", pp. 24-24). On July 9, 1999, the Ninth Circuit issued an Order vacating the order dated November 18, 1998, denying the Petition for Rehearing and stating that a separate order amending the opinion of June 15, 1998 would be issued (App. "C", pp 21-22). On July 15, 1999, the Ninth Circuit issued an Order amending its opinion dated June 15, 1998 (App."B", pp. 19-20).

A prior opinion of the Ninth Circuit Court of Appeals in. Farr v. US West, Inc was reported at 58 F.3d. 1361 (1995). Previous opinions of the District Court dated were reported at 815 F. Supp. 1360 and 815 F.Supp. 1364 (D.Or. 1992).

II JURISDICTION

The Ninth Circuit Court of Appeals entered its opinion and affirmed the judgment on June 15, 1998, (App."A"). The Ninth Circuit initially granted Plaintiff's Petition for Rehearing on November 18, 1998 (App."D"). On July 9, 1999, the Ninth Circuit issued an Order vacating the order dated November 18, 1998, denying the Petition for Rehearing and stating that a separate order amending the opinion of June 15, 1998 would be issued(App. "C"). On July 15, 1999, the Ninth

Circuit issued an Order amending its opinion dated June 15, 1998 (App. "B"). The July 15, 1999 amendment related to the reasons for denying an award of back pay to Plaintiffs and relates directly to the substance of this Petition.

Petitioners seek review of the decision of the Ninth Circuit dated June 15, 1998 as modified by the Order Amending Opinion dated July 15, 1999.

The jurisdiction of this Court is invoked under 28 USC Section 1254(1).

III STATUTORY PROVISIONS INVOLVED

Questions Presented Nos. 1-3: Petitioners seek relief under 29 U.S.C. § 1132(a)(3) which reads, in pertinent part, as follows:

> "A civil action may be brought . . . (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this subchapter or the terms of the plan . . . ."

Question Presented NO. 4: Plaintiffs' have also sought relief under various state law claims with respect to the misrepresentations made by Defendants. The Ninth Circuit held that the state law claims were preempted by 29 U.S.C. Section 1144(a) which reads, in pertinent part, that ERISA "shall supersede . . . State laws" to the extent that those laws "relate to any employee benefits plan."

IV STATEMENT OF THE CASE.

A. Proceedings Below.

Generally, the Ninth Circuit held that Defendants' breached their fiduciary duties under ERISA. Further, the Ninth Circuit found that reinstatement of Petitioners to their prior employment was infeasible and that "appropriate equitable relief" did not include back pay, reformation of the plan or any compensatory relief against ERISA fiduciaries to redress the violations of ERISA. The Ninth Circuit also held that all state law claims relating to the misrepresentations were preempted by ERISA

Summary of Prior Proceedings:

1. **First District Court Summary Judgment:** In 1991, the United States District Court for the District of Oregon, District Judge Malcolm Marsh granted summary judgment for the Respondents with respect to all claims. The District Court held that ERISA preempted all state law claims, that Plaintiffs could not bring individual claims for fiduciary breach under ERISA, no breach of fiduciary duty occurred and that the relief requested was not available under 29 USC Section 1132(a)(3). Plaintiffs appealed to the Ninth Circuit Court of Appeals.

2. **First Ninth Circuit Decision:** The Ninth Circuit affirmed the District Court's decision granting summary judgment for the Respondents on the ERISA breach of fiduciary duty claim and reversed the District Court, with respect to the issue of ERISA preemption of the state law claims. The Court of Appeals held that the state law claims relating to the misrepresentations concerning possible tax consequences were not preempted by ERISA as they

did not "relate" to the Plan because they did not arise out of the administration of the Plan.

3. **District Court Summary Judgment after Remand:** Upon remand to the District of Oregon, District Judge Malcolm Marsh again granted summary judgment for the Respondents. Judge Marsh did not follow the Ninth Circuit's mandate of remand because he believed the Supreme Court's decision in Varity Corp. v. Howe, 516 US 489, 116 S.Ct. 1065, 134 L.Ed. 2d. 130 (1996), altered the preemption analysis. After considering Varity, the district Court again held that Plaintiffs' state law claims were preempted by ERISA, that no breach of fiduciary duty occurred and that the requested remedies were not available under ERISA. Plaintiffs again appealed to the Ninth Circuit Court of Appeals.

4. **Second Ninth Circuit Decision:** On June 15, 1998, the Ninth circuit reversed the district Court by finding that the Defendants breached their ERISA fiduciary duties to Plaintiffs. The Ninth Circuit, however, again affirmed the District Court with respect to the ERISA preemption of the state law claims and also held that Plaintiffs had no remedy under ERISA for the breach of fiduciary duty.

5. **Modification of Ninth Circuit Decision:** Following a Petition for Rehearing and a Motion for Reconsideration and Clarification, the Ninth Circuit, on July 15, 1999, amended its earlier opinion date June 15, 1998, by clarifying the reasons for denying back pay and front pay as forms of appropriate equitable relief.

B. Statement of Facts.

Plaintiffs were long-term employees of Defendants US West, Inc. and US West Communications. In January 1990, plaintiffs elected to retire under an amendment to the US West Management Pension Plan known as the 5+5 Program that created early retirement incentives for many long-term employees. As part of the election to retire early, plaintiffs elected to receive benefits under the 5+5 Program including an election to receive their accrued pension benefits in the form of a lump sum distribution. Based upon the materials provided by Defendants indicating that the lump sum option offered significant tax advantages, Plaintiffs believed that the entire amount of the lump sum distributions could be rolled-over into an (Individual Retirement Account (IRA) on a tax-deferred basis. The Ninth Circuit stated that the information that had been provided by the Defendants failed to include an explanation of the possible adverse tax consequences known to the Defendants or an explanation of who might be adversely affected by the tax limitations.

The Ninth Circuit found that Defendants, as plan fiduciaries, were well aware of the adverse tax impact on some employees and made a deliberate decision not to disclose this information to the employees. After US West had informed employees that electing the lump sum payments might "offer significant tax advantage," US West officials knew that there would be significant adverse tax consequences to some of those who elected the lump sum distribution. The US West officials discussed the issue and affirmatively decided to withhold the information from plan beneficiaries. The Ninth Circuit found that the Defendants provided incomplete and misleading information about the potential tax consequences of accepting the 5+5 Program retirement option with the lump sum distribution.

The Ninth Circuit also specifically found that one of the reasons the Defendants excluded the information about the adverse tax issues was to save money for the

Defendants.

The Ninth Circuit concluded: "Defendants' failure to inform Plaintiffs about the potential tax consequences of lump sum distributions constitutes a breach of their fiduciary duties, which caused individual harm to the Plaintiffs who suffered adverse tax consequences."

While finding that Defendants breached their fiduciary duties to Plaintiffs under ERISA, the Ninth Circuit also concluded that **no** "appropriate equitable relief" was available under 29 U.S.C. Section 1131(a)(3) and that all state law claims against the employer were pre-empted.

The types of relief considered by the Ninth Circuit and rejected as unavailable under 29 USC Section 1132(a)(3) were as follows:

(1) The Court held that reinstatement of the employees to the positions held when they elected early retirement in 1990 was infeasible and not possible after such a substantial passage of time. Petitioners do not dispute that after nearly nine years of litigation to establish that Defendants breached their fiduciary duties to Plaintiffs, reinstatement is no longer feasible.

(2) The Court held that because reinstatement was not possible, back pay (and/or front pay) would not be an "equitable remedy" under these circumstances. The Court stated that because reinstatement was not a viable alternative given the amount of time that has passed since Plaintiff's left the company, Plaintiffs' request for front and back pay is "moot." Petitioners disagree with the characterization of the issue as "moot." The

Court should have determined whether front and/or back pay are forms of "appropriate equitable relief".

(3) The Court considered but rejected restorative relief, such as a direction to the Plan administrator to reform the terms of the '5+5' Program to lessen or eliminate the 'excess' tax liability of employees who elected early retirement with the lump sum distribution option.

(4) The Court held that no form of compensatory relief was available with respect to any breach of duty by an ERISA fiduciary.

The decision of the three judge Ninth Circuit panel contained two Concurring Opinions.

The Concurring Opinion of Circuit Judge Noonan stated that existing Ninth Circuit precedent compelled the decision (i.e. no available equitable remedy). The concurring opinion, however, appeared to question the validity of existing Ninth Circuit precedent which limits the scope of traditional remedies against breaching fiduciaries, as follows:

> "When it is a fiduciary that has breached its trust, of course the remedy must be equitable. What else could a court making a trustee true to its trust be doing except providing equitable relief?"
>
> • * * * *
>
> "If we are unable to do equity here, I agree with Judge Hawkins that Congress should right the wrong."

Judge Noonan also stated his belief that the circuit should grant *en banc* review to distinguish Mertens v. Hewitt Assoc. 508 U.S. 248, 113 S.Ct. 2063, 2068-2069, 124

L.Ed.2d 161 (1993) on the basis that Mertens dealt with a non-fiduciary and this case involved a breach by a fiduciary.

A second Specially Concurring Opinion was written by Circuit Judge Hawkins who stated that the actions of the Defendants "represented a gross violation of fiduciary duty." Judge Hawkins noted the apparent inconsistency between this Court's statement in Varity Corp. v. Howe, 116 S.Ct. 1065 (1996), that "it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy" and the Ninth Circuit's restrictive interpretation denying all remedies for such a breach based upon this Court's decision in Mertens v. Hewitt Assocs., 508 U.S. 248, 255 (1993).

Judge Hawkins concluded that "this case so aptly demonstrates [that], perhaps, Congress should rethink the limited remedies provided in [ERISA] Section 502 and afford a greater range of relief to beneficiaries when a fiduciary so clearly breaches its duties."

C. Basis Of Federal Court Jurisdiction.

This action was brought under 29 U.S.C. Section 1132(a)(3). The Federal Courts have exclusive jurisdiction of civil actions brought under ERISA. 29 U.S.C. Section 1132(e)(1).

V. REASONS FOR GRANTING THE PETITION

A. Introduction.

This Court should grant the Petition to decide the circumstances, if any, in which traditional equitable remedies such as restitution (including back and front pay), reformation and other types of monetary relief apply to employer/fiduciaries who have been found to have engaged in "gross violations" of their duties under ERISA.

Without a uniform standard, the availability of traditionally equitable remedies for breach of an ERISA fiduciaries' duty is subject to confusing interpretations and unpredictable results. It has been 25 years since the enactment of ERISA and the scope of the remedies available as "appropriate equitable relief" to remedy **fiduciary** breaches remains unresolved. Because of the lack of a uniform standard, courts have applied similar remedies in different manners.

In this case, the Ninth Circuit considered and rejected several possible equitable remedies including reinstatement, back, front pay, reformation, restitution and a surcharge of the fiduciary, all based upon its interpretation of this Court's decision in Mertens v. Hewitt Assoc., and existing Ninth Circuit precedents.

B. Conflict Between the Circuits.

The Ninth Circuit stated that back pay without rescission and front pay were not considered to be "an equitable remedy in these circumstances" because reinstatement was no longer a feasible alternative. The Ninth Circuit specifically noted that its decision conflicted with the decision of the Sixth

Circuit in Schwartz v. Gregori, 45 F.3d. 1017, 1021-23 (6th Cir. 1995)(back pay and front pay were allowed in ERISA claim in which reinstatement was found to be infeasible.

The Sixth Circuit's decision in Schwartz v. Gregori and the Ninth Circuit's decision in Farr v. U.S. West (See App. A), are in direct conflict and both are based upon the respective Circuit's interpretation of the Mertens decision.

In Schwartz v. Gregori, the plaintiff was found to have been involuntarily discharged from employment in violation of ERISA. The court also found that reinstatement was not a feasible remedy in light of the hostility between the parties. The question on appeal was the relief available under 29 USC Section 1132(a)(3) for a former employee who had been discharged in violation of ERISA. The Sixth Circuit specifically considered the "question in light of Mertens . . . whether back pay and front pay are equitable or legal remedies."

The Sixth Circuit found that back pay was a form of restitution and therefore a remedy expressly recognized by Mertens as equitable. Relying upon the reasoning of Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 80 S.Ct. 332, 4 L.Ed.2d. 323 (1960), the Sixth Circuit considered the following factors in determining that the back pay remedy was a form of restitution and therefore equitable relief:

1. The back pay at issue was awarded against the employer (rather than a third party) and operated to restore the plaintiff that which would have been enjoyed but for the employer's illegal conduct;

2. While restitution generally is awarded to

prevent unjust enrichment to the defendant, this is not required in every case;

3. It is not necessary that restitution be made in kind, for a court may restore the plaintiff to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its equivalent in money.

The Sixth Circuit went on to conclude that the court's historical assessment of the nature of front pay was that it was an equitable remedy which was awarded only when the preferred remedy of reinstatement (stated to be indisputably an equitable remedy) was not appropriate or feasible. Because front pay was an equitable remedy it was concluded that it was available under 29 USC Section 1132(a)(3).

In Farr v. US West, the employees were induced through misrepresentations by their employers to elect early retirement from their long-term employment with the Defendants. The Defendants were ERISA fiduciaries and their deliberate failure to provide information regarding possible adverse tax consequences to Plaintiffs was found by the Ninth Circuit to have violated ERISA. One of the reasons the Defendants knowingly withheld information from the Plan beneficiaries was to save the employer money at the beneficiaries' expense. Reinstatement was not considered to be appropriate equitable relief because it was no longer feasible.

Had the Ninth Circuit applied the factors from Mitchell v. Robert DeMario Jewelry, Inc., which the Sixth Circuit considered in Schwartz v. Gregori, The Ninth Circuit should have concluded that back pay

and front pay were restitutionary remedies that are expressly recognized by Mertens as equitable. Specifically, the back pay would have been awarded against the employer (rather than against a third party) and would operate to restore to the plaintiffs the salaries and benefits which they would have enjoyed but for the fact that they were induced through illegal misrepresentations to elect early retirement. In this case, back pay would also prevent unjust enrichment to Defendants because one of the purposes of the 5+5 Program was to reduce the number of employees on the payroll and thereby save money. Defendants were unjustly enriched through the savings in salary and benefits expenses for those employees who were illegally induced to elect early retirement because of the misrepresentations. Since it has been found that restitution through reinstatement is no longer possible, restitution should be made available through the receipt of its equivalent in money (i.e. back pay). The court in its discretion could also award front pay until each of the plaintiffs would have reached normal retirement age.

Rather than apply the reasoning adopted in Schwartz v. Gregori and Mitchell v. Robert DeMario Jewelry, Inc. to determine whether back pay was an equitable remedy, the Ninth Circuit, without citation of authority, adopted its own test and a conflicting result. The Ninth Circuit ignored the question of whether back pay was a form of restitutionary relief expressly approved under Mertens. Instead, the Court reasoned that because reinstatement (with equitable rescission of the election to retire) was not possible an award of back pay without equitable rescission would not be an equitable remedy. The question of whether the election to retire may have been illegally induced through the deliberate misrepresentation of the employer was not taken into account in the decision.

The Ninth Circuit did not consider whether the request for front pay was equitable relief and reached a contrary result to that reach by the Sixth Circuit in Schwartz v. Gregori.

It must be noted that Schwartz v. Gregori involved a retaliatory discharge in violation of 29 USC Section 1140 whereas Farr v. US West involve a violation of the duty of loyalty under 29 USC Section 1104(a). However, both Section rely on 29 USC 1132(a)(3) and the phrase "appropriate equitable relief" to determine the available remedies. The type of ERISA violation (i.e. Section 1104 or Section 1140) that causes the plan participant to lose or give up their career does not appear to be relevant in determining the types of equitable relief available under Section 1132(a)(3).

The Ninth Circuit's conclusion that Plaintiff's requests for back pay and front pay are rendered moot also conflicts with the reasoning and conclusion of the Sixth Circuit in Schwartz v. Gregori. The relevant Ninth Circuit statement is as follows:

> "Because reinstatement is clearly not a viable alternative in the present case, given the amount of time that has passed since Plaintiffs left the company, we need not decide whether reinstatement would be available under [29 USC Section 1132(a)(3)]. That conclusion, in turn, renders Plaintiffs' request for front and back pay moot. Thus we affirm the district court's conclusion that reinstatement would not be an appropriate remedy." (See App."A" at p.14 and App. "B").

The Ninth Circuit found that given the amount of time that has passed since Plaintiffs' left the company, reinstatement is not feasible and therefore it is not an appropriate remedy. Petitioners do not

seek review on the issue of the feasibility of reinstatement because of the length of time that has elapsed since Plaintiffs retired and this litigation began. This finding simply means that reinstatement cannot be "appropriate equitable relief" under Section 1132(a)(3) and is therefore not an available form of relief. Such a conclusion does not render the issue of reinstatement "moot" and in turn does not render Plaintiffs' requests for front and back pay "moot." The Sixth Circuit stated that reinstatement was indisputably an equitable remedy but authorized back pay and front pay where reinstatement was not appropriate or feasible. The Ninth Circuit should have at least considered the merits of whether such remedies were available under 29 USC Section 1132(a)(3)..

The Ninth Circuit cites no authority for its unique position that back and front pay requests are "moot" when reinstatement is not possible. Such a conclusion is grossly "inequitable" because it rewards a fiduciary in breach of its duties for dragging out the litigation process to totally escape all liability by eventually rendering reinstatement, back pay and front pay "moot." If simple delay can be used as the basis of eliminating liability, the equitable maxim that "equity shall suffer no wrong without a remedy" will be rendered meaningless. The Ninth Circuit's precedent which fails to determine if back pay, front pay and reformation are forms of equitable relief and therefore rewards delay by a breaching fiduciary is an affront to the traditions of equity and should be reviewed by this Court.

C. Related Questions:

Question Presented #2: Question 2 has

been included because the Ninth Circuit requested briefing on the availability of restorative relief including reformation of the ERISA plan as a form of equitable relief. After briefing by the parties, the Ninth Circuit rejected the option of granting restorative relief or reformation without specific comment. Petitioners submit that reformation of the Plan is a form of "appropriated equitable relief" which should have been formally considered by the Ninth Circuit and that guidance concerning when such restorative relief would be appropriate to ensure uniform standards among the circuits.

In Armistead v. Vernitron Corp. 944 F.2d. 1287, 1295 (6th Cir. 1991) the Sixth Circuit affirmed an order requiring reformation (as an acceptable form of equitable relief) of an ERISA summary booklet because it did not reflect the agreement of the parties. The Ninth Circuit did not discuss why it rejected reformation of the 5+5 Program as a form of appropriate equitable relief. The availability of the remedy of reformation should be reviewed by this Court to determine whether it may be a form of appropriate equitable relief to redress violations of an ERISA fiduciaries duties to plan participants.

Question Presented #3: It is only necessary for the Court to consider Question 3 if it is determined that back pay, front pay and reformation do not provide adequate relief or are not appropriate forms of equitable relief in this case. In Mertens, this Court stated that the phrase "appropriate equitable relief" "remains a question of interpretation in each case which [broad or narrow interpretation] meaning is intended." It was further stated that the Mertens decision only affected the potential joint liability of persons who had no real power to control the plan (i.e. non-fiduciaries). Since the question presented in Mertens involved only a **non-fiduciary**, the question

remains whether a narrow interpretation of the available forms of relief is also appropriate to redress violations by ERISA **fiduciaries**. In his Concurring Opinion, circuit Judge Noonan stated that he believed the Ninth Circuit should distinguish this case from Mertens because of the differences between allegations against a non-fiduciary and a fiduciary breach.

Question Presented #4: The fourth question presented for review (ERISA preemption) has been included because it relates to the overall scheme of ERISA and the need for uniform standards. The confusion is this area is evident from the conflicting views on this question between the 1995 Ninth Circuit decision and the 1998 decision. Basically, in 1995, the Ninth Circuit held that the statements concerning possible tax consequences did not "relate" the ERISA Plan and therefor were not preempted. In the 1998 decision, the Ninth Circuit following, Varity Corp. v. Howe, 516 U.S. 489 116 S.Ct. 1065, 134 L.Ed.2d 130 ,held that because the tax consequences of the 5+5 Program are part of the overall mix of information relied upon by Plaintiffs' in making their decisions to participate in the plan, they also "relate to" plan administration.

Varity did not consider or decide whether all misrepresentations made by an employer acting in dual capacities preempted by ERISA if the information is part of the overall mix but includes information about an ERISA plan. In this case, the misrepresentations about possible tax consequences involving the lump sum distributions were made by corporate officials of Defendants in the context of communicating the 5+5 Program early retirements offer to employees. The information was not made as part of the normal administration of the ERISA governed pension plan.

Varity held that employer provided information that was part of the overall mix must be provided in a manner consistent with any ERISA fiduciary obligations of the Employer. The reasoning was that if dual capacities of employer and fiduciary existed, the plan beneficiaries were entitled to infer that the information provided was subject to fiduciary standards. However, Varity was not a preemption case and the question of whether all information that is included in the overall mix of information is preempted when it is made in capacity as employer and violates state laws governing misrepresentations.

The ERISA preemption issue involving misrepresentations made by the employer was not answered by Varity and remains unresolved.

D. Timeliness of the Issues:

In the Specially Concurring Opinion by Judge Hawkins, it was suggested that Congress should review the statutory language with respect to the ". . . range of relief provided to beneficiaries when a fiduciary so clearly breaches its duties." Judge Noonan, in his Concurring Opinion, agreed that "Congress should right the wrong" in the courts were unable to do equity. However, it is not an economical use of resources for Congress to "rethink" the statutory language until this Court has resolved the conflict with the Sixth Circuit and had the opportunity to more fully interpret the phrase "other appropriate equitable relief" in the context of a **fiduciary** breach. Before Congress "rethinks" the scope of remedies available under ERISA as suggested by Judges Noonan and Hawkins, this Court should first expressly review the scope of "appropriate equitable relief" in a case involving a **fiduciary** breach.

It should be noted that Congress is presently considering legislation known as the "Patients Bill of Rights" (Senate Bill 6) and the Bipartisan Concensus Managed Care Improvement Act (HR 2723) which would modify the ERISA preemption of state laws to allow individuals to bring an action under ERISA against an HMO for damages. Also, the state of Texas has enacted legislation which attempts to permit patients to by-pass the ERISA preemption provision and bring state law claims directly against HMO's for malpractice relating to treatment decisions. See: Section 88.002 of the Texas Civil Practice and Remedies Code. Since one of the objectives of ERISA was to promote uniformity in the administration of employee benefit plan, it would seem that a decision by this Court on the important question of remedies available for fiduciary breaches might promote uniformity and make such piecemeal changes unnecessary.

VII. CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Leslie L. Wellman, Esq.
10340 NE Weidler St., Suite #200
Portland, Oregon 97220
Telephone: (503) 255-4047
Counsel for Petitioner

October 1999

APPENDIX "A"

U.S. 9th Circuit Court of Appeals

DONALD J. FARR; GREGORY H. ISHMIEL; ROD W. TRACY; WILLIS L. RADER; JOSEPH T. DEAN; ROBERT HEUSER; JEANETTE P. NEUFELD, Plaintiffs/Appellants, v. U.S. WEST, INC.; US WEST COMMUNICATIONS, INC.; US WEST MANAGEMENT PENSION PLAN; U.S. WEST EMPLOYEE'S BENEFIT COMMITTEE, Defendants/Appellees.	No. 96-36051 D.C. Nos. CV-91-1186 MA (Lead Case) CV-92-330 MA CV-92-485 MA (Consolidated Cases) OPINION

Appeal from the United States District Court
for the District of Oregon Malcolm F. Marsh, District Judge, Presiding

Argued and Submitted
November 5, 1997--Portland, Oregon

Filed June 15, 1998

Before: John T. Noonan and Michael Daly Hawkins, Circuit Judges, and Robert R. Merhige, Jr.,* District Judge.

Opinion by Judge Merhige; Concurrence by Judge Noonan; Concurrence by Judge Hawkins

COUNSEL

Leslie L. Wellman, Portland, Oregon, for the appellants.

D. Ward Kallstrom, Lillick, McHose & Charles, San Francisco, California, for the appellees.

OPINION

MERHIGE, District Judge:

This case arises under ERISA, the Employee Retirement Income Security Act of 1974, 29 U.S.C. S 1001, et seq. Seven former employees of U.S. West, Inc. appeal the district court's summary judgment dismissal of their action alleging that U.S. West breached its fiduciary duties under ERISA by misrepresenting facts relating to the tax consequences of an early retirement program, providing misleading or incomplete information about potential adverse tax consequences, and failing to allow the employees to rescind their early retirement. On remand from Plaintiffs' prior appeal, the District Court granted summary judgment for Defendants, holding the following: Plaintiffs' state law claims are preempted by ERISA; individual relief is available under ERISA; Defendants did not breach their fiduciary duties to Plaintiffs; assuming arguendo, that Defendants did breach their fiduciary duties, Plaintiffs were not damaged thereby; and the monetary damages sought by Plaintiffs are not recoverable as "other appropriate equitable relief" under ERISA S 502(a)(3), 29 U.S.C. S 1132(a)(3). We hold the following: in light of Varity Corp v. Howe, 116 S. Ct. 1065 (1996), Plaintiffs' state law claims are preempted by ERISA; and although Defendants breached their fiduciary duties to Plaintiffs, the damages Plaintiffs seek are nonetheless not recoverable as "other appropriate equitable relief" under ERISA S 502(a)(3), 29 U.S.C. S 1132(a)(3). Thus, we affirm in part, reverse in part, and affirm the judgment.

I.

Plaintiffs were long-term employees of Defendants US West, Inc. and US West Communications. In January 1990, Plaintiffs chose to retire under an amendment to the US West Management Pension Plan known as the "5 + 5 program," which created early retirement incentives for many long-term employees. Under the 5 + 5 program, Plaintiffs chose to receive their accrued pension benefits in a lump sum. Plaintiffs allege that US West did not tell them that those lump sum distributions in excess of the amount qualified to be rolled over into Individual Retirement Accounts ("IRAs") would be taxed immediately.

On Dec. 15, 1989, J. Thomas Bouchard, Senior Vice President and Chief Human Resources Officer at US West, sent a letter to employees eligible to retire under the 5 + 5 program. Attached to the letter was a 15-page booklet providing an overview of the program. The booklet included a section entitled "Tax Considerations Affecting Choice of Distribution" which purported to "highlight[ ] the basic federal tax rules" relevant to the choice between taking the pension benefits in a lump sum or in a series of monthly installments. The booklet warned plan participants that the tax consequences of the available options were "very complex" and that employees "should consult with your tax advisor." For those who were not age 50 before 1986, the booklet provided the following information on lump sum distributions: "Distribution fully included in taxable income received except to the extent rolled over to another IRS-qualified plan or IRA within 60 days." For those who were age 50 before 1986, the booklet provided the following information on lump sum distributions: "All or part of [lump sum] distribution may be rolled over to another qualified plan or an IRA within 60 days without any current tax liability." The booklet did not say that only qualified portions of the lump sum distributions could be rolled over, and that everything else would be taxed.

The Dec. 18, 1989 issue of US West Today, a publication

circulated to US West employees, contained an interview with Charles Kamen, the Executive Director of Human Resources for US West, with the heading "Lump-Sum option clarified." In response to questions regarding the tax consequences of the lump sum option, Kamen stated, "Obviously, the lump-sum payment will provide you with a large amount of money that you can control and invest however you like. For some, the lump sum may also offer significant tax advantages."

On Jan. 17, 1990, several Pension Plan representatives and US West managers participated in a live telecast presentation concerning the 5 + 5 program broadcast to eligible employees. The telecast featured a panel of US West officers and upper management employees. Before the telecast aired, two of the panelists discussed the possibility of disclosing the potential tax problems with lump-sums that could not be rolled over into IRAs, but decided to withhold this information. During the broadcast, Kamen mentioned that a "qualified portion of the lump-sum distribution" could be rolled over into an IRA, but did not explain what he meant by "qualified portion."

Each of the Plaintiffs retired under the 5 + 5 program, elected to receive their accrued benefits in lump sums, attempted to roll over all of their lump sums into IRAs, but discovered that only qualified portions of those sums could be rolled over, and the rest was promptly taxed. On Feb. 6, 1990, after US West management realized that a significant number of people were in this predicament, it held a meeting to discuss possible responses. The plan actuary suggested reducing the discount rate from 8% to 5.25% on the excess portion of the lump sum to mitigate unfavorable tax consequences. The US West Employees' Benefits Committee adopted this proposal.

Plaintiffs subsequently submitted claims to the Plan for additional benefits to offset their unexpected tax liability. The Benefits Committee denied their claims.

Plaintiffs allege that US West breached its fiduciary duty to them under ERISA S 404 by providing them with incomplete, false, and misleading information regarding the tax consequences of their lump sum distributions.1 Plaintiffs additionally sued US West under Oregon state law for, inter alia, fraud and negligent misrepresentation.

II.

On the first hearing of the case, the district court awarded US West summary judgment on both the ERISA and the state law claims. First, the district court held that even if US West had breached a fiduciary duty to Plaintiffs, Plaintiffs would not be entitled to the relief they sought because ERISA does not provide for individual recovery for breaches of fiduciary duties. Farr v. U.S. West, Inc., 815 F. Supp. 1364, 1374-75 (D. Or. 1992). The district court also held that, even if US West had a fiduciary duty to Plaintiffs, it had not breached that duty in this case. The court further held that the lost tax benefits sought by Plaintiffs are extra-contractual damages which are not "other appropriate equitable relief " authorized under ERISA S 502(a)(3), 29 U.S.C. S 1132(a)(3). Id. At 1373-76. Finally, the district court held that Plaintiffs' state law fraud and negligent misrepresentation claims were preempted by ERISA. Id. at 1363.2

Plaintiffs appealed both the preemption ruling and the grant of summary judgment for Defendants. On appeal, we took the following actions: reversed the district court's decision that Plaintiffs' state law claims are preempted by ERISA, holding that the alleged misrepresentations did not "relate to" the Pension Plan; affirmed the district court's entry of judgment for Defendants on the ERISA claim on the ground that ERISA precluded an individual claim for relief for breach of fiduciary duty; did not address the district court's factual findings that Defendants did not breach their fiduciary duties; and did not address the district court's conclusion that the tax benefit losses sought by Plaintiffs are not recoverable under ERISA S 502(a)(3), 29 U.S.C. S 1132(a)(3). Farr v. U.S. West, Inc., 58 F.3d 1361 (9th Cir. 1995).

After remand, the parties filed cross-motions for summary judgment and briefed the issue of whether Varity Corp. v. Howe, 116 S. Ct. 1065 (1996), decided after we had remanded the case, required re-examination of this Court's mandate. On September 3, 1996, the district court took the following actions: granted Defendants' motion for summary judgment on Plaintiffs' state law claims, holding that the state law claims were preempted by ERISA under the reasoning of Varity; stated that pursuant to Varity, beneficiaries may seek individual relief pursuant to ERISA's SS 1109 and 1132(a)(3); and granted summary judgment for Defendants on Plaintiffs' fiduciary breach claim under ERISA based on its previous determination that Defendant had not breached its fiduciary duties.3

We review to determine whether (1) Varity negated this Court's mandate on remand that ERISA does not preempt the former employees state law claims; (2) Defendants breached their fiduciary duties under ERISA by not informing the employees about the potential tax consequences of lump sum distributions; and (3) the remedies sought by the Plaintiffs are available under ERISA S 502(a)(3), 29 U.S.C.S 1132(a)(3).

III.

[1] ERISA S 514(a) preempts state law claims that "relate to" employee benefit plans. See 29 U.S.C.S 1144(a). A state law claim "relates to" an employee benefit plan if it has a connection with or reference to such a plan. See California Div. Of Labor Standards Enforcement v. Dillingham Constr., Inc., 117 S. Ct. 832, 837 (1997). In the first appeal, we held that Plaintiffs' state law claims for breach of contract, fraud, and misrepresentation did not "relate to" the Plan because the alleged misrepresentations did not arise out of Plan administration, but were made by US West in its employer capacity and thus, were not preempted by ERISA. See Farr , 58 F.3d at 1366-67. The district court did not follow this mandate on remand because it believed that the Supreme

Court's decision in Varity, which expanded the parameters of "plan administration," altered our preemption analysis. After considering Varity, the district court again held that Plaintiffs' state law claims were preempted by ERISA.

[2] Whether ERISA preempts state law is a question of law reviewed de novo. See Velarde v. PACE Membership Warehouse, Inc., 105 F.3d 1313, 1316 (9th Cir. 1997). We agree with the district court's reasoning regarding the impact Varity has on ERISA preemption analysis. Our previous conclusion that the Defendants' statement regarding the tax consequences of plan benefits did not relate to plan management was premised upon a narrower understanding of plan management than that articulated by the Supreme Court in Varity. Under the Court's reasoning in Varity, the tax consequences of the 5 + 5 plan clearly "relate to" plan administration because they are part of the overall mix of information relied upon by Plaintiffs in making their decisions to participate in the plan. Thus, we affirm the district court's conclusion that Plaintiffs' state law claims are preempted pursuant to S 514(a).

IV.

The district court granted summary judgment to Defendants, holding that Defendants had not breached their fiduciary duties under ERISA. A grant of summary judgment is reviewed de novo. See Covey v. Hollydale Mobilehome Estates, 116 F.3d 830, 834 (9th Cir. 1997); see also Williams v. Cater-pillar, Inc., 944 F.2d 658, 661 (9th Cir. 1991)(holding the de novo standard of review of summary judgment on appeal applies as much to an ERISA action as to any other civil action). Our review is governed by the same standard used by the trial court under Federal Rule of Civil Procedure 56(c). See Ghotra v. Bandila Shipping, Inc., 113 F.3d 1050, 1054 (9th Cir. 1997). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. See Covey, 116 F.3d at 834.

[3] ERISA requires a "fiduciary " to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." ERISA S 404(a), 29 U.S.C. S 1104. Although the Supreme Court in Varity declined to reach the question of whether ERISA imposes a duty on fiduciaries to disclose truthful information on their own initiative, or in response to employee inquiries, 116 S. Ct. at 1075, we have previously held that a "fiduciary has an obligation to convey complete and accurate information material to the beneficiary's circumstance, even when a beneficiary has not specifically asked for the information." Barker v. American Mobil Power Corp., 64 F.3d 1397, 1403 (9th Cir. 1995) (citation omitted). Defendants' failure to explain to Plaintiffs in either written or verbal communications the potentially negative tax consequences they might face by choosing to participate in the 5 + 5 retirement plan was a breach of Defendants' fiduciary duties.

For example, the December 18, 1989 booklet, "Supplement to the Summary Plan Description" (SSPD), and the "Summary of Material Modification" to the Plan failed to include facts known to Defendants about the possible adverse tax consequences relating to lump sum distributions. The booklet also stated that "[a]ll or part" of the lump sum distribution could be rolled over into an IRA without current tax liability. The booklet failed to include an explanation that only qualified portions of the lump sum distributions could be rolled over without incurring current tax liability and an explanation of who might be adversely affected by the limitation. These omissions in the summary plan description were misleading for employees making the important decision of whether to exercise the 5 + 5 retirement option, and therefore, violate ERISA's requirement that "[t]he format of the summary plan description must not have the effect to misleading, misinforming or failing to inform participants and beneficiaries." 29 C.F.R. S 2520.102-2(b).

The December 18, 1989 issue of US West Today contained an interview with Kamen under the headline "lump-sum

option clarified," which stated that "[f]or some, the lump sum may also offer significant tax advantages." The article did not clarify that for others the lump sum would present significant tax disadvantages. A January 15, 1990 issue of US West Today contained an extensive discussion of the 5 + 5 program, including information about the way the lump-sum benefit was calculated. The article contained no mention of the Internal Revenue Code S 4154 problem or the adverse tax consequences. In a January 17, 1990 live in-house television broadcast intended to explain the 5 + 5 offer to employees, panelists decided beforehand to withhold the potential tax problems with lump sums. In that telecast, Kamen stated that a "qualified portion of the lump-sum distribution " could be rolled over into an IRA, but failed to explain what he meant by "qualified portion."

As the district court noted, Defendants do not dispute that there was no information provided explaining the S 415 limitations on the portions of lump sum distributions that were eligible to be rolled over to another qualified plan or an IRA without current tax liability, even though they were well aware of the adverse impact S 415 would have on some employees. Kamen, an employee of US West, confirmed that a deliberate decision was made to leave the information out to avoid "confusing" the issues for other employees.

[4] The record shows that one of the reasons the Defendants excluded the information about the S 415 limitations was to save money. A report written in November 1989 indicated that it would be costly to the company to provide such information, and estimated that 690 employees would receive amounts exceeding S 415 limitations. This, of course, is not a valid justification for withholding information. As the Supreme Court stated in Varity, "to participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense, is not an act `solely in the interests of the participants and beneficiaries.' " Varity, 116 S. Ct. at 1074.

Defendants argue that they fulfilled their fiduciary duties

by advising participants on several occasions, including in the summary plan description, to consult with a tax advisor because of the complexity of the tax consequences. We agree that the Benefits Committee did not have a duty to provide Plaintiffs with individualized notice of all the ways the tax laws would impact each of their individual distributions. As we have noted, "to require summary plan descriptions to discuss the application of general rules to a wide range of particular situations and thereby provide specific advice to employees on how to shape their conduct to fit the rules, would undermine the statute. . . ." Stahl v. Tony's Bldg. Materials, Inc., 875 F.2d 1404, 1408 (9th Cir. 1989). "A summary plan description, therefore, cannot violate ERISA merely because it could have included language more specifically discussing the precise situation of a particular beneficiary." Id.

[5] However, although we have held that it is enough if an employee is alerted "to recognize that certain events or actions could trigger a loss of benefits," id., Defendants failed to provide sufficiently detailed information to employees to alert them of the precise nature and likelihood of such a possibility. For Plaintiffs to be sufficiently on notice that the potential adverse tax consequences would affect them, Defendants had an obligation to explain the nature of the potential problem and, in general terms, who might be negatively affected. For example, Defendants should have explained to employees the difference between excess lump sum benefits that cannot be "rolled over" into IRAs and are therefore subject to immediate taxation and qualified benefits which can be "rolled over" without immediate taxation. Defendants' fiduciary duties also required them to explain more specifically what categories of employees would be likely to be affected by the S 415 limitations, such as employees expecting larger amounts of financial benefits. With this information, individual employees would be alerted that they themselves might face adverse tax consequences and could make informed decisions about whether they needed to seek professional tax advice.

[6] In sum, the ERISA fiduciary duty includes the common law duty of loyalty, which requires fiduciaries to deal fairly and honestly with beneficiaries. See Varity, 116 S. Ct. at 1075. Defendants had a duty to provide thorough and accurate information explaining the 5 + 5 retirement option that it offered to entice employees to retire. Instead, Defendants provided incomplete and misleading information about the potential tax consequences of accepting that option. Given the expanded notion of the fiduciary duties of plan administrators articulated by the Supreme Court in Varity, we conclude that Defendants' failure to inform Plaintiffs about the potential tax consequences of lump sum distributions constitutes a breach of their fiduciary duties, which caused individual harm to the Plaintiffs who suffered adverse tax consequences.

V.

[7] Although Defendants breached their fiduciary duties and Plaintiffs were damaged thereby, no remedy is available to Plaintiffs under ERISA. Plaintiffs seek the following remedies for the alleged damage caused by US West's breach of its fiduciary duties: (a) a surcharge equal to all the taxes they have paid and will pay on their excess benefit distributions; (b) reinstatement with back and front pay; (c) punitive damages; and (d) prejudgment interest and attorneys' fees. Plaintiffs assert that these remedies are among those permitted under section 502(a)(3) of ERISA, 29 U.S.C. S 1132(a)(3).

Plaintiffs' claim arises under section 404 of ERISA, 29 U.S.C. S 1104. That section enumerates the affirmative duties of a plan fiduciary, and section 409, 29 U.S.C.S 1109, provides for liability for any breach of those fiduciary duties. ERISA S 502, 29 U.S.C. S 1132, provides the remedial provisions of ERISA and outlines the causes of action which may be maintained by plan participants and actions subject to enforcement by the Department of Labor. Section 502(a) is divided into three categories. The first category, a claim for benefits under 502(a)(1), permits plan beneficiaries and

participants to compel recovery of specific benefits due under the terms of a plan. The second category, a claim for breach of fiduciary duty under Section 502(a)(2), provides that a participant or the Secretary may pursue an action to obtain "appropriate relief" under S 409.5 The third category, Section 502(a)(3) is the "catchall" provision, which provides for injunctive or "other appropriate equitable relief " under 502(a)(3) to redress a violation of "any provision of this sub-chapter or the terms of the plan."6 Plaintiffs' requests for remedies for Defendants' alleged breach are brought exclusively under S 502(a)(3). Plaintiffs concede that they have no remedy under sections 502(a)(1) or (a)(2).

[8] The district court declined to allow Plaintiffs to recover their tax benefit losses, holding that lost tax benefits are "extra-contractual" and thus do not fall within "other appropriate equitable relief" available under section 502. See Farr, 815 F. Supp. at 1375-76. During the time that has elapsed since the district court addressed this issue, the Supreme Court has held that the language "appropriate equitable relief" under S 502(a)(3) does not authorize suits for money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of duty. See Mertens v. Hewitt Assocs., 508 U.S. 248, 257-63 (1993). We later held, based on Mertens that monetary relief in the form of compensatory damages is also unavailable under S 502(a)(3) to remedy a fiduciary's breach, finding that "the status of the defendant, whether fiduciary or nonfiduciary, does not affect the question of whether damages constitute `appropriate equitable relief' under S 502(a)(3)." McLeod v. Oregon Lithoprint Inc., 102 F.3d 376, 378 (9th Cir. 1996), cert. denied, 117 S. Ct. 1823 (1997). We further held that "the Varity opinion does not alter the holding in Mertens that compensatory damages are unavailable under S 502(a)(3)." Id. at 379.

[9] Thus, binding precedent compels us to conclude that Plaintiffs may not recover their tax benefit losses under S 502(a)(3), despite the fact that that conclusion leaves Plaintiffs without a remedy for an alleged breach of fiduciary

duty under ERISA. Similarly, Plaintiffs may not recover punitive damages under S 502(a)(3), as we have previously held that S 502(a)(3) does not provide for compensatory or punitive damages. See Concha v. London, 62 F.3d 1493, 1504 (9th Cir. 1995) (citing Mertens, 508 U.S. at 260-63).

[10] Plaintiffs also seek reinstatement with back and front pay. The district court concluded that there is no authority, statutory or otherwise, which would permit a court to provide reinstatement as a remedy for a violation of a breach under S 404 via SS 409 and 502, and that even if there were, reinstatement was not a viable alternative. See Farr , 815 F. Supp. at 1364. Because reinstatement is clearly not a viable alternative in the present case, given the amount of time that has passed since Plaintiffs left the company, we need not decide whether reinstatement would be available under S 502(a)(3). That conclusion, in turn, renders Plaintiffs' request for front and back pay moot. Thus, we affirm the district court's conclusion that reinstatement would not be an appropriate remedy.

In conclusion, although Defendants breached their fiduciary duties to Plaintiffs, Plaintiffs nonetheless are not entitled to any of the remedies they seek under ERISA.

VI.

For the foregoing reasons, we affirm in part and reverse in part the opinion of the district court, and affirm the judgment.

AFFIRMED

NOONAN, Circuit Judge, concurring:

The decision is compelled by Ninth Circuit precedent but I believe we should ask the circuit to take the case en banc and distinguish Mertens, 508 U.S. 248 (1993). Mertens dealt

with damages to be obtained from a non-fiduciary. Id. at 251. When it is a fiduciary that has breached its trust, of course the remedy must be equitable. What else could a court making a trustee true to its trust be doing except providing equitable relief?

If we are unable to do equity here, I agree with Judge Hawkins that Congress should right the wrong.

HAWKINS, Circuit Judge, specially concurring:

The very best thing that can be said about what happened to the U.S. West employees who elected to participate in this early retirement program is that it represented a gross violation of fiduciary duty. U.S. West officials knew there would be significant tax consequences to some of those who elected to receive their benefits in a lump sum. They even talked about it before a televised presentation to employees and affirmatively decided to withhold the information from plan beneficiaries. This left in place an earlier statement from U.S. West that electing lump sum payments might "offer significant tax advantages."

It was particularly important that employees considering early retirement know this information, as the form for electing the program also required an election with respect to lump sum or periodic payment. Employees, in other words, could not elect early retirement and then take some time to seek outside advice whether lump sum or periodic payment made the best economic sense. But these employees were not even told what the phrase "qualifying amount" meant or that amounts that did not "qualify" would be taxed as ordinary income in the year received. One suspects that if the CEO of U.S. West were eligible for this program, he or she would have been told. If fiduciary duty means anything, it is that the information the greatest in a group needs to know must also be told to the least.

In Varity Corp. v. Howe, 116 S. Ct. 1065 (1996), the Supreme Court stated: "it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy." Id. at 1078. Yet that is exactly, according to the Supreme Court interpretation of ERISA S 502(a)(3), 29 U.S.C. S 1132(a)(3), what Congress has done. See Mertens v. Hewitt Assocs., 508 U.S. 248, 255 (1993).

We have faithfully applied Mertens and its restrictive interpretation of S 502(a)(3). See FMC Medical Plans v. Owens, 122 F.3d 1258, 1261 (9th Cir. 1997); McLeod v. Oregon Lithoprint Inc., 46 F.3d 956, 960 (9th Cir. 1995); Waller v. Blue Cross of California, 32 F.3d 1337, 1339 (9th Cir. 1994). Although money damages are available under S 502(a)(3) in the form of restitution, such a remedy does not help Plaintiffs here. I recognize that ERISA is a complex set of interrelated rules that create and also limit beneficiaries' rights and remedies. But as this case so aptly demonstrates, perhaps Congress should rethink the limited remedies provided in S 502 and afford a greater range of relief to beneficiaries when a fiduciary so clearly breaches its duties. the end

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FOOTNOTES

*Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

1 Section 404(a), as codified in 29 U.S.C. S 1104(a), provides in pertinent part:

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and --

(A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . . .

2 The district court held that the 5 + 5 program did not constitute a separate "excess benefit plan" exempted from ERISA preemption under 29 U.S.C. S 1002(36). 815 F. Supp. at 1363-64. We agree with the district court that the 5 + 5 program did not constitute a separate "excess benefit plan" under S 1002(36).

3 In its initial grant of summary judgment, the district court indicated that its opinion was also its findings and conclusions, in lieu of a bench trial.

4 Section 415 of the Internal Revenue Code of 1986, 26 U.S.C. S 415 provides the maximum contributions and benefits which may be provided
under retirement plans qualified under 26 U.S.C.S 401(a). The S 415 limits for the pension plan are determined after considering certain contributions which have been made for a participant under other pension plans and any defined contribution plans sponsored by the employer.

5 Section 502(a)(2), as codified in 29 U.S.C. S 1132(a)(2), provides: "(a) Persons empowered to bring a civil action. A civil action may be brought - . . . (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title."

6 Section 502(a)(3), as codified in 29 U.S.C. S 1132(a)(3), provides in pertinent part: "A civil action may be brought -- . . . (3) by a participant, beneficiary, or fiduciary (A) to enjoin any

act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations."

APPENDIX "B"

U.S. 9th Circuit Court of Appeals

DONALD J. FARR; GREGORY H. ISHMIEL; ROD W. TRACY; WILLIS L. RADER; JOSEPH T. DEAN; ROBERT HEUSER; JEANETTE P. NEUFELD, Plaintiffs/Appellants, v. U.S. WEST, INC.; US WEST COMMUNICATIONS, INC.; US WEST MANAGEMENT PENSION PLAN; U.S. WEST EMPLOYEE'S BENEFIT COMMITTEE, Defendants/Appellees.	No. 96-36051 D.C. Nos. CV-91-1186 MA (Lead Case) CV-92-330 MA CV-92-485 MA (Consolidated Cases) ORDER AMENDING OPINION

Filed July 15, 1999

Before: John T. Noonan, Ferdinand F. Fernandez and Michael Daly Hawkins, Circuit Judges.

ORDER

The Opinion appearing at 151 F.3d 908 (9th Cir. 1998), is amended as follows:

Page 915, second column, second full paragraph, lines 9-

10: substitute "backpay and reinstatement or front pay" for "reinstatement with back and front pay."

Page 916, second column, second full paragraph, lines 1-2: substitute "Plaintiffs also seek back pay and reinstatement or front pay until normal retirement age" for "Plaintiffs also seek reinstatement with back and front pay."

Page 916, second column, second full paragraph, lines 15-16: insert footnote call "7" following "That conclusion, in turn, renders Plaintiffs' request for front and back pay moot." On same page insert corresponding footnote as follows:

> 7/ The viability of plaintiffs' requests for back pay in this case is inextricably linked to the viability of their request for reinstatement or front pay as, in effect, the relief here sought is equitable rescission of the agreement to retire. Since the passing of time and the plaintiffs' own admissions establish that rescission is no longer possible, an award of back pay without rescission would not be an equitable remedy in these circumstances. We note, however, that the viability of ERISA claims for lost wages and reinstatement will not always be so linked. See, e.g., Schwartz v. Gregori, 45 F.3d 1017, 1021-23 (6th Cir. 1995) (allowing award of back and front pay as alternative equitable remedy to reinstatement for retaliatory discharge under S 502(a)(3)).

Judge Fernandez does not join.

APPENDIX "C"

FILED
JUL- 9 1999
CATHEY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD J. FARR; GREGORY H. ISHMIEL; ROD W. TRACY; WILLIS L. RADER; JOSEPH T. DEAN; ROBERT HEUSER; JEANETTE P. NEUFELD, Plaintiffs/Appellants, v. U.S. WEST, INC.; US WEST COMMUNICATIONS, INC.; US WEST MANAGEMENT PENSION PLAN; U.S. WEST EMPLOYEE'S BENEFIT COMMITTEE, Defendants/Appellees.	No. 96-36051 D.C. Nos. CV-91-1186 MA (Lead Case) CV-92-330 MA CV-92-485 MA (Consolidated Cases) ORDER

Before: NOONAN, FERNANDEZ and HAWKINS, Circuit Judges.

The mandate that issued on June 15, 1999 is recalled. The panel's Order of June 7, 1999 is withdrawn.

Defendants-Appellees' Motion for Leave to

Supplement Briefing on Rehearing is denied.

The portion of the panel's Order of November 18, 1998, granting Plaintiffs-Appellants' petition for rehearing , is vacated.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc and no judge of the court called for a vote to rehear this matter en banc within the time specified under Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

An "Order Amending Opinion" will be filed separately.

APPENDIX "D"

FILED
NOV 18 1998
CATHEY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD J. FARR; GREGORY H. ISHMIEL; ROD W. TRACY; WILLIS L. RADER; JOSEPH T. DEAN; ROBERT HEUSER; JEANETTE P. NEUFELD,

Plaintiffs/Appellants,

v.

U.S. WEST, INC.; US WEST COMMUNICATIONS, INC.; US WEST MANAGEMENT PENSION PLAN; U.S. WEST EMPLOYEE'S BENEFIT COMMITTEE,

Defendants/Appellees.

No. 96-36051

D.C. Nos.
CV-91-1186 MA
(Lead Case)
CV-92-330 MA
CV-92-485 MA
(Consolidated Cases)

ORDER

Before: NOONAN, FERNADEZ,* and HAWKINS, Circuit Judges.

The panel having been reconstituted, Judges Noonan

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* Judge Fernandez was drawn to replace Judge Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, who retired from the bench.

and Hawkins voting in favor and Judge Fernandez against, the Petition for Rehearing of Plaintiff-Appellants is granted. Within 20 days of the filed date of this Order, the parties shall file simultaneous letter briefs, not to exceed 15 pages, addressed to the following issues:

1. Whether restorative relief, such as a direction to the Plan Administrator to reform the terms of the "5+5" plan by adjusting the discount rate to lessen or eliminate the "excess" tax liability of employees who elected a lump sum (vs. periodic) payment, is consistent with Section 502(a)(3) of ERISA.

2. Whether the Plan Administrator could be required to restore the lump sum electees to their position prior to electing participation in the "5+5" plan.

3. Whether either form of relief would be consistent with Mertens v. Hewitt Assocs., 508 U.S. 248 (1993), and McLeod v. Oregon Lithoprint, Inc., 102 F.3d 376 (9th Cir. 1996), as equitable relief.

Following receipt of the parties' letter briefs, the panel will advise the parties whether further argument is necessary.